IN THE

Supreme Court of the United States

October Term, 1965

No. 210

JAMES T. STEVENS,

Petitioner,

against

Honorable CHARLES A. MARKS, Justice of the Supreme Court of New York, County of New York,

Respondent.

No. 290

JAMES T. STEVENS,

Petitioner,

For a Writ of Habeas Corpus to inquire into his detention by JOHN J. McCLOSKEY, Sheriff of New York City,

Respondent.

MOTION FOR RECONSIDERATION OF CERTIORARI

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Statement

This is a motion for reconsideration of two orders of this Court, entered October 11, 1965, granting the petitioner's applications for certiorari, limited to the first question presented in his petitions, to wit:

> "Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?"

The basis for the present motion is that the question has not been passed upon by the courts below.

Argument

The petition for certiorari here calls into question the constitutionality of a provision of the Constitution of the State of New York and a provision of the Charter of the City of New York. The challenge to these provisions was previously made on appeal from the petitioner's conviction to the appellate courts of the State of New York and, on habeas corpus, to the Federal District Court and Court of Appeals for the Second Circuit. None of these tribunals, however, reached or passed upon the merits of the challenge, for the courts below considered themselves bound by the holding of this Court in *Regan* v. *New York*, 349 U. S. 58 (1955). That case, factually indistinguishable from the present one, likewise declined to reach the merits, deeming such a determination procedurally premature.

In opposing the petition for certiorari in the present case, the People, after restating the question presented, referred to and relied upon the opinions below, which we

believed clearly revealed the limited grounds upon which this cause was decided below. It was perhaps an oversight in the People's original opposition brief that we failed to underline the fact that the question posed in the petition is not ripe for review by this Court at the present stage of proceedings. It is to remedy this neglect on our part, as well as to forestall needless argument, that we now respectfully move for reconsideration.

It seems highly dubious that this Court intended to constitute itself a forum of first instance to consider so vital a question as the constitutionality of a provision of the State Constitution of New York and the parallel provision in the New York City Charter. This appears particularly doubtful where the courts below specifically restrained themselves from reaching the issue on the authority of a holding of this Court. It may be that this Court, by its grant of certiorari, signified its readiness to reconsider the controlling effect of *Regan* today, perhaps in the light of subsequent holdings on the applicability of the Fifth Amendment to state proceedings [*Malloy* v. *Hogan,* 378 U. S. 1 (1964); *Murphy* v. *Waterfront Commission,* 378 U. S. 52 (1964)]. But if so, that question was not presented in the petition, and certiorari was explictly granted on a quite different issue. Or the Court, by its order, may have ruled, *sub silentio,* that the procedural doctrine of *Regan* is no longer operable. But if that be so, then it would seem that the appropriate disposition would be to remand the matter to the state courts for a ruling upon the merits. For the courts of New York have not yet had the opportunity to consider the claim of unconstitutionality. Nor would such a remand be an idle procedural gesture.

The New York courts may invalidate the provisions in question, after considering recent holdings of this Court, or they may so interpret the provisions as to obviate the major constitutional arguments leveled against them. For example, the dismissal feature may be construed to contemplate an optional departmental determination, in which the public officer's failure to testify under a waiver of immunity could be considered on the question of fitness with opportunities to explain consistent with due process.

That both courts below to whom certiorari was directed decided the issue exclusively on the strength of *Regan* v. *New York* (*supra*) and never reached the question upon which certiorari was granted is clear from relevant portions of their opinions. The Appellate Division of the New York Supreme Court, First Department (22 App. Div. 2d 683) wrote:

> "In view of our conclusion that *Regan* v. *New York* is controlling here, we do not reach the question as to the effect of *Mallory* [*sic*] v. *Hogan*, 378 U. S. 1, and *Escobedo* v. *Illinois*, 378 U. S. 478, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position."

Judge WEINFELD, writing for the United States District Court for the Southern District of New York, stated:

> "Finally, petitioner's success depends upon reconsideration of a Supreme Court decision which, so long as its validity remains unimpaired, this Court regards as dispositive of petitioner's claim."

Judge WEINFELD was also referring to *Regan* v. *New York*. Judge KAUFMAN, writing for the United States Circuit Court for the Second Circuit, noted that he did not regard *Regan* "as having been weakened, much less *sub silentio* overruled, by *Malloy* v. *Hogan*, 378 U. S. 1 (1964)." The court noted as "significant" Justice REED's "exposition of the decision's rationale in *Regan*": "The invalidity of the waiver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify" (349 U. S. at 64). "That holding," the Second Circuit went on to say, "its force unimpaired by intervening decisions, is dispositive of Stevens' claims."

To invoke certiorari jurisdiction, a federal issue must be drawn in question by the state court decision upon which review is sought. This tenet is so basic and virtually self-evident that extensive recourse to authorities is perhaps unnecessary. Nonetheless, several cases in this Court deserve mention. In *Musser* v. *Utah*, 333 U. S. 95 (1948), the Court, after discovering on oral argument a possible defect of vagueness in a state statute, remanded the matter for state consideration of the issue, declaring, "We believe we should not pass upon the questions raised here until the Supreme Court of Utah has had opportunity to deal with this ultimate issue of federal law and with any state law questions relevant to it." (*Id.*, at p. 98.) In *Adler* v. *Board of Education*, 342 U. S. 485, 496 (1952), the appellants in this Court urged for the first time that the state statute was unconstitutionally vague. The Court replied simply, "The question is not before us. We will not pass upon the constitutionality of a state statute before

the state courts have had an opportunity to do so [citations omitted]." A footnote to Mr. Justice CLARK's opinion in *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956), note 2 at p. 555, explains that probable jurisdiction there was noted only after the New York Court of Appeals amended its remittitur to state that a federal question had been presented and passed upon [*Daniman* v. *Board of Education*, 307 N. Y. 806 (1954)]. In companion cases involving the same issue, this Court granted a motion to dismiss the appeal "for want of a properly presented federal question" in view of the New York Court of Appeals refusal to similarly amend the remittitur as to those defendants [*Daniman* v. *Board of Education*, 307 N. Y. 806 (1954), 348 U. S. 933 (1955)].

Nor is the discretionary "doctrine of abstention" relevant here [see, generally, *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Dombrowski* v. *Pfister*, —— U. S. ——, 85 S. Ct. 1116 (April 26, 1965); *Harmon* v. *Forssenius*, —— U. S. ——, 85 S. Ct. 1177 (April 27, 1965)]. No original federal jurisdiction is here claimed. Hence, we do not predicate our motion on the claim that the lower federal courts, in their discretion, properly abstained from consideration of the validity of the state law. Those courts declined to reach the merits for an entirely different reason: they were bound to reject the claim as procedurally immature. And, equally obviously, we do not move that this Court "abstain" from reaching the merits on the certiorari issued to the state appellate court. Rather we argue that the merits have not been properly drawn in question by the order below. Nor could it have been in the light of *Regan* v. *New York* (*supra*).

Conclusion

In sum, if the Court intended to bring up for reconsideration the holding of *Regan* v. *New York, supra,* upon which all lower courts relied, the question should be appropriately amended, notwithstanding the failure of the petition to present that question. If, contrary to Judge KAUFMAN's view below, the Court deems *Regan* no longer controlling, then the order granting certiorari should be amended to delete the question and forthwith remand the matter to the Appellate Division of the New York Supreme Court for consideration of the merits of the question presented in the petition for certiorari. A proper regard for the federal relationship, as well as practical considerations, counsel a determination of the constitutionality of the state provisions by the state courts before consideration of the issue by this Court. Finally, if the Court intended neither of the above results, it is urged, certiorari should be dismissed as improvidently granted.

WHEREFORE, the People respectfully pray for reconsideration of the petition for certiorari and for such other and further relief as may be just and appropriate in the circumstances.

No previous application for the relief herein sought has been made.

Respectfully submitted,

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November, 1965